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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 291

ELSIE C. WIPER, Executrix of the Estate of
Joseph W. Wiper, Deceased,
Petitioner,
vs.
GREAT LAKES ENGINEERING WORKS,
a Michigan corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF OF GREAT LAKES ENGINEERING WORKS, A MICHIGAN CORPORATION, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 340 F. 2d 727, and is printed on pages 12-18 of petitioner's

brief and appendix. The opinion of the District Court is unreported, but is printed on pages 9-11 of petitioner's brief and appendix.

JURISDICTION

The opinion of the Court of Appeals was filed January 29, 1965. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

None.

QUESTION PRESENTED

Does the opinion of the Court of Appeals create any lack of uniformity with the opinions of this Court or other Federal Courts relating to the boundaries of admiralty and maritime jurisdiction?

STATEMENT

This lawsuit was begun by a civil complaint filed in the United States District Court for the Eastern District of Michigan, alleging a cause of action for the wrongful death of petitioner's decedent, Joseph W. Wiper, a seaman employed on the Erie Sand Steamship Company's vessel, SS HYDRO. The respondent, Great Lakes Engineering

Works (hereinafter referred to as "Great Lakes") is the owner of a dock at which the HYDRO was tied at the time of Mr. Wiper's death. Jurisdiction was based on Title 28 U.S.C. §1332, there being allegations of diversity of citizenship and an amount in controversy exceeding $10,000.00.

An earlier lawsuit had been filed in the United States District Court for the Western District of New York on behalf of Wiper's Estate against the Erie Sand Steamship Co., based upon the Jones Act, Title 46 U.S.C. §688. That action was tried beginning March 22, 1960, and resulted in a verdict and judgment for the defendant. The Court of Appeals for the Second Circuit affirmed. *Wiper v. Erie Sand Steamship Co.*, (2 Cir. 1961) 293 F. 2d 491. The testimony in the Jones Act trial disclosed the circumstances which are known concerning Mr. Wiper's death.

Following the affirmance of the Jones Act judgment for defendant by the Second Circuit, the respondent in the present case moved for summary judgment, and it was stipulated at the time of oral argument on the motion that the transcript of the Jones Act trial could be considered an exhibit to the motion, and that the testimony in the present case as to the circumstances of Wiper's death would follow that introduced in the earlier case.

Great Lakes' motion was based on the premise that no genuine issue of fact existed and it was entitled to judgment as a matter of law, inasmuch as the evidence was insufficient as a matter of law to support a finding that Great Lakes' alleged negligence proximately caused Wiper's death.

U. S. District Judge Fred W. Kaess, who heard the motion, agreed with this contention and entered a judgment in Great Lakes' favor, from which an appeal was taken.

The transcript which became an exhibit to Great Lakes' motion contains testimony that the HYDRO was taken to Great Lakes' facilities near Detroit, Michigan, on September 9, 1958, because of propulsion trouble (227, 228).[1] On or about September 11, 1958, the vessel was moved into Great Lakes' No. 1 slip, where she remained until the repairs were completed. The dock to which the HYDRO was tied was composed of sand, stone and cinders (234).

About 40 to 75 feet from the place where the HYDRO was berthed, a roadway ran up the dock towards the Great Lakes machine shop (241, 336). The same roadway continued on into the town of River Rouge, Michigan, less than a mile away (351). It was not unusual for the HYDRO's crew to go into River Rouge at night for recreation while she was tied to the Great Lakes dock (261, 263-264). However, the other crewmen were evidently able to make their way safely to and from the ship, because Wiper was the only crew member who was lost (79).

During the afternoon of September 15, about 4 or 5 o'clock, George D. Griswold, the Marine Superintendent of Erie Sand Steamship Co., talked with Wiper on the vessel and noticed that he had been drinking (343, 344). Griswold suggested that Wiper get some sleep, and apparently Wiper heeded this advice because at about 8:00 p.m. that evening a seaman, John McLaughlin, awakened Wiper in his room to tell him that the Great Lakes employees were looking for an oil seal (33, 34). Wiper said he would go over to the shop and check on the missing part, and then dressed in street clothes (33, 101, 114). The record does

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[1] Figures in parentheses refer to pages in transcript admitted as exhibit to Great Lakes' motion for summary judgment.

not support petitioner's assertion that Wiper was "ordered" by respondent's mechanic to go to the shop for the oil seal.

The captain of the HYDRO, Millard S. Brewer, came aboard the vessel at about 8:30 p.m. that evening and met Wiper on the deck (242). They conversed briefly and Captain Brewer noticed the smell of alcohol on Wiper's breath and a heaviness in his speech. He asked Wiper to go back to bed, but instead Wiper went down the ladder to the dock and started up toward the roadway (243, 244). The Captain stated that at that time Wiper "could walk O.K." (254).

Another crewman, Willis Campbell, was returning to the HYDRO at about 8:30 p.m., and he passed Wiper on the roadway which led to the machine shop and to the town of River Rouge (336, 337). Wiper walked alright then, as far as Campbell could remember (338). Wiper did not return with the oil seal and about 11:00 p.m. that evening Great Lakes' master mechanic obtained the seal and brought it to the vessel (308).

The HYDRO sailed the following morning, and three days later, on September 19, 1958, Wiper's body was recovered in the slip. An autopsy was performed by the Wayne County Medical Examiner, who found the cause of death to be asphyxia by drowning (213). He also found Wiper's blood alcohol content to be .35%. An expert witness, Dr. Vincent Scanurra, testified that a person with .35% of blood alcohol content would tend to be stuporous or approaching a completely comatose state (214, 215). He testified further that from .25% up, a person would need assistance in simple acts such as dressing and walking, and he would not behave in a normal fashion (217). Dr. Scanurra concluded that despite the admitted differences

in alcoholic tolerance of individuals, the decedent would have been "somewhere between a very sleepy and stuporous state and complete coma at .35%" (220).

Evidence in the Jones Act trial relating to the condition of the dock was contradictory, but no attempt is being made to state the evidence favorable to Great Lakes, since the motion for summary judgment, being addressed only to the matter of proximate cause, in effect admitted the allegations of negligence in the complaint, for purposes of the motion.

Following the submission of briefs and the hearing of oral arguments, the Court of Appeals affirmed the Judgment of the District Court in favor of the respondent.

ARGUMENT

DOES THE OPINION OF THE COURT OF APPEALS CREATE ANY LACK OF UNIFORMITY WITH THE OPINIONS OF THIS COURT OR OTHER FEDERAL COURTS RELATING TO THE BOUNDARIES OF ADMIRALTY AND MARITIME JURISDICTION?

The Court of Appeals held in this case that (1) in the absence of a maritime status or relationship, the test of locality determines whether a tort action is maritime or non-maritime; (2) there was no maritime status or relationship between petitioner's decedent and Great Lakes; (3) the tort alleged in petitioner's Complaint occurred, if at all, upon land within the State of Michigan, and is therefore governed by the law of Michigan; and (4) under Michigan law, there was not sufficient evidence to submit to the jury the question of whether Great Lakes' alleged negligence proximately caused the death of petitioner's decedent.

In arguing that the court below erred, petitioner cites authorities demonstrating that a maritime character has been found to exist with respect to certain injuries occurring on land. These include actions by seamen under the Jones Act, 46 U.S.C. §688, and for maintenance and cure; and actions by longshoremen under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950, and upon the theory that a shipowner with whom they had a maritime relation had breached a warranty of seaworthiness.

Obviously, however, these cases do not conflict with the opinion below, because in each of them the existence of maritime jurisdiction for injuries occurring on land rested upon either interpretation of a statute or breach of a duty arising out of a maritime status or relation.

The first category is not applicable here because as petitioner candidly admits, "There are no statutes involved herein."

Notwithstanding petitioner's argument to the contrary, it is equally apparent that no maritime status or relation existed between Wiper and Great Lakes. To support the position that such a status or relation did exist, petitioner mistakenly relies on *Kermarec v. Compagine Generale Transatlantique,* (1959) 358 U.S. 625. *Kermarec* merely held that an injury to a visitor aboard a vessel involved a maritime tort. The tort was held to be maritime because of its locality, having occurred on navigable waters.

In the present case, decedent Wiper's maritime status or relation was that arising out of his employment by the vessel owner, the Erie Sand Steamship Company. But Great Lakes was a stranger to this relation and its only duty toward Wiper was that of a possessor of land toward one who is authorized to go upon the land. Great Lakes

owed no duty to Wiper arising out of a maritime contract of employment. Consequently, as between Great Lakes and Wiper, the test of whether the alleged tort was maritime or not was the traditional test of locality. For this reason, the cases upon which petitioner relies, in which admiralty jurisdiction was found to exist regardless of locality, because they arose out of a maritime status, are not authoritative in this case.

Petitioner's counsel contends that the opinion of the appellate court creates a conflict regarding the boundaries of admiralty jurisdiction for seamen as opposed to harbor workers. But the court was not attempting to adjudicate the rights of anyone based upon his status as a seaman or harbor worker. Petitioner's error is in injecting any "seaman" or "harbor worker" or "scope of employment" concepts into this case when they are clearly irrelevant.

In view of the holding by the District Court and the Court of Appeals that no maritime status existed between Wiper and Great Lakes, the fact that Wiper had been a seaman was insignificant. Without a maritime status being involved, admiralty jurisdiction depended strictly upon locality of the alleged tort, regardless of whether Wiper was a seaman or one who had never before left dry land. *Kermarec v. Compagnie Generale Transatlantique, (supra)* 358 U.S. 625; *Weinstein v. Eastern Airlines, Inc.,* (3 Cir. 1963) 316 F2d 758, *cert. den.* 375 U.S. 940.

The opinion below merely involved an application of the time-honored locality test, resulting in a holding that the tort alleged was non-maritime. It was not based on any statute relating to seamen or harbor workers, and it will have no bearing whatever on the scope of admiralty jurisdiction in other cases which are properly based upon a status as seaman or harbor worker. The conflict which petitioner perceives is wholly imaginary.

CONCLUSION

This is not a proper case for granting certiorari because (1) there are not "special and important reasons therefor" within the guide-lines stated in Rule 19 of the Supreme Court Rules, and (2) the Court of Appeals correctly decided this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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May 25, 1965.